SUPREME COURT, U. S.

AUG 4 1967

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IN THE

Supreme Court of the United States

October Term, 1967.

No. 455

CLAYTON H. STIEF,

Petitioner,

v.

J. A. SEXAUER MANUFACTURING CO., INC.

and

DIAMOND ALKALI COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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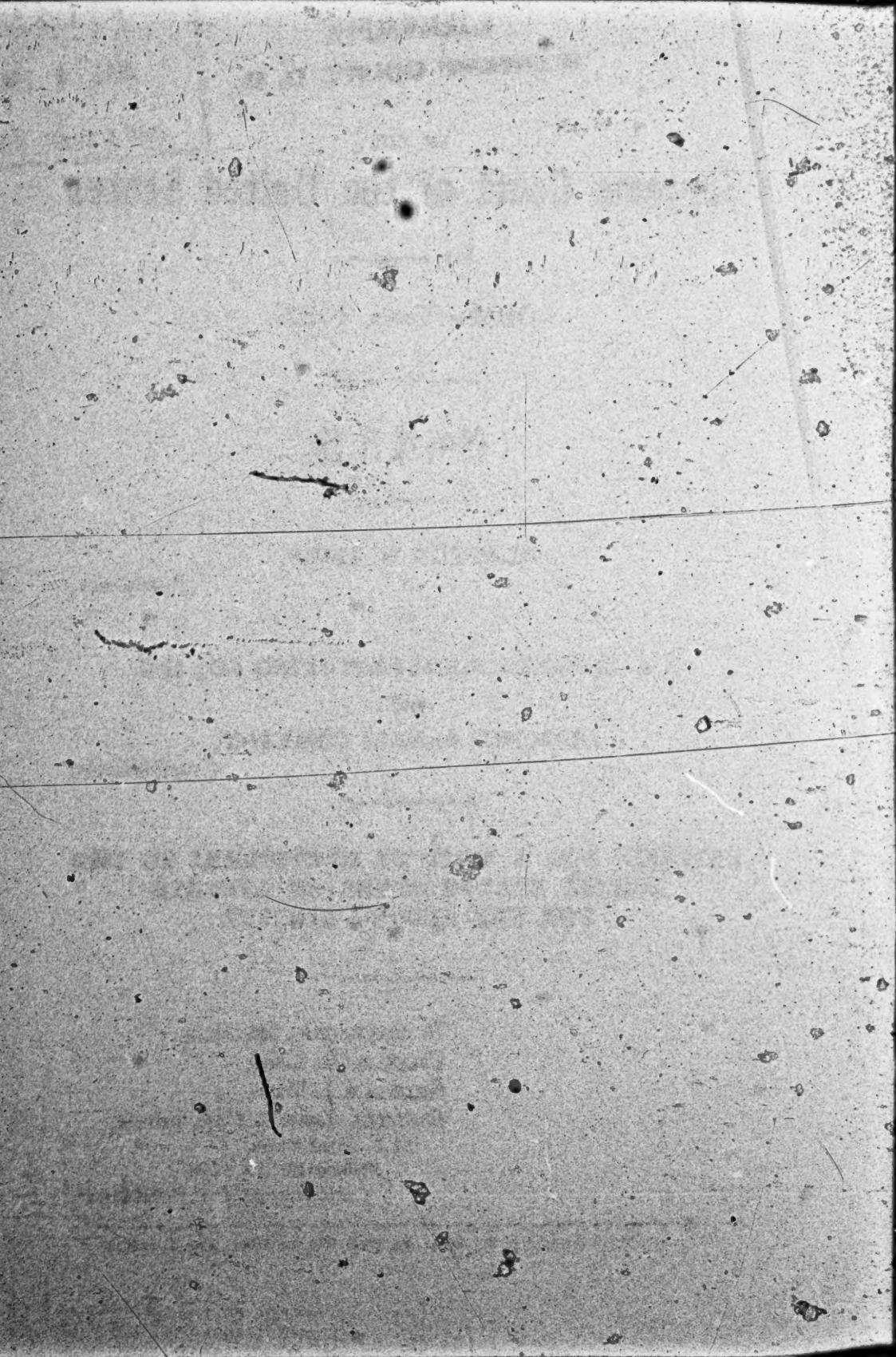

INDEX.

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	4
Reasons Urged for Granting the Writ	15
Introduction	16
I. Petitioner Has Been Deprived of His Right to Trial by Jury as Guaranteed by the Seventh Amendment by the Actions of the Courts Below	17
II. The Court of Appeals for the Second Circuit, in Deciding This Case, Has Ignored the Command of Erie Railroad Company v. Tompkins, 304 U. S. 64, 58 S. Ct. 817 (1938)	27
Conclusion	32

TABLE OF CASES CITED.

	Page
Antonelli v. Tumolo, 390 Pa. 68, 132 A. 2d 285 (1957)	3, 15, 20, 21, 26
Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, 369 U. S. 355, 82 S. Ct. 780 (1962)	22
Butler v. L. Sonneborn Sons, Inc., 296 F. 2d 623 (C. A. 2, 1961)	23, 25
Byrd v. Blue Ridge Rural Elec. Cooperative, 356 U. S. 525, 78 S. Ct. 893, 2 L. Ed. 2d 953	15, 19, 20, 22
Carpini v. Pittsburgh and Weirton Bus Company, 216 F. 2d 404 (C. A. 3, 1954)	24, 25
Erie Railroad Company v. Tompkins, 304 U. S. 64, 58 S. Ct. 817 (1938)	2, 14, 15, 16, 27, 29, 30
Herron v. Southern Pac. Co., 283 U. S. 91, 51 S. Ct. 383, 75 L. Ed. 857	22
Lavender v. Kurn, 327 U. S. 645 (1946)	3, 19, 20, 21
MacDougall v. Penna. Power and Light Co., 311 Pa. 387, 166 A. 589 (1933)	31
Maize v. The Atlantic Refining Co., 352 Pa. 51, 41 A. 2d 850 (1945)	2, 3, 14, 15, 26, 28, 29, 30
Pease v. Sinclair Refining Co., 104 F. 2d 183 (C. A. 2, 1939)	23
Pope v. The Reading Company, 304 Pa. 326, 156 Atl. 106 (1931)	3, 14, 15, 26, 28, 29, 31
Rockwell v. Stone, 404 Pa. 561, 173 A. 2d 48 (1961)	29
Swafford v. The Atlantic Coastline Railroad Company, 350 U. S. 807, 76 S. Ct. 80 (1955)	21
Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865	28

STATUTES CITED.

	Page
c. 646, Act of June 25, 1948, 62 Stat. 928, 28 U. S. C. § 1254(1)	2
U. S. Constitution, Seventh Amendment	2, 16, 17

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To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

CLAYTON H. STIEF, by his Attorneys, RICHTER, LORD & CAVANAUGH, respectfully petitions that a Writ of Certiorari issue to review the judgment which was entered by the United States Court of Appeals for the Second Circuit on May 10, 1967.

OPINIONS BELOW.

The opinion of the Court of Appeals of 7th day of April, 1967 is not reported. — F. 2d —. On the basis of that opinion, the United States Court of Appeals for the

Second Circuit entered judgment affirming the judgment of the United States District Court for the Southern District of New York, which had entered a judgment for the defendant.

The opinion of the said Court of Appeals denying plaintiff's timely petition for Rehearing was filed May 10, 1967, and is not reported — F. 2d —. Circuit Judge Friendly dissented from the denial of said petition.

JURISDICTION.

The judgment of the United States Court of Appeals for the Second Circuit was entered on April 7, 1967. Plaintiff's Petition for Rehearing in said Court was timely filed. Defendant filed no answer or brief in opposition thereto. Said Petition was denied by order entered May 10, 1967. The jurisdiction of this Court is invoked under c. 646, Act of June 25, 1948, 62 Stat. 928, 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Did not the District Court and the Court of Appeals deprive the petitioner of his right to a trial by jury guaranteed by the Seventh Amendment of the United States Constitution when it held that there should be a directed verdict for the defendants "because the cause of the accident was completely unknown", when petitioner's well qualified expert testified that the cause of the accident was known and that the accident was caused by defendants' highly dangerous product with extremely dangerous propensities about which the petitioner had not warned and by which this young petitioner was totally blinded for life?

2. Did not the District Court and the Court of Appeals violate the dictate of *Erie Railroad Company v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817 (1938) when they refused to recognize the law of Pennsylvania as controlling—more specifically the cases of *Maize v. The Atlantic Refining Com-*

pany, 352 Pa. 51, 41 A. 2d 850 (1945) and *Antonelli v. Tumolo,* 390 Pa. 68, 132 A. 2d 285 (1957) and *Pope v. Reading Company,* 304 Pa. 326, 156 Atl. 106 (1931), and to the contrary applied what they believed the "general law to be".

3. Is not the rule of *Lavender v. Kurn,* 327 U. S. 645 (1946), and FELA case as adopted by Pennsylvania in *Antonelli v. Tumolo, supra* as its basic test of submissibility as to causation binding on all Federal Courts or at least in diversity actions controlled by Pennsylvania law because the accident and all contacts occurred and exist there, or must a plaintiff eliminate every other possibility that arises from the evidence except those supporting him?

4. Does not this case present squarely the need for decision now of the judge-jury issue as to causation and burden of proof where inextricably involved therein is the federally protected constitutional right to trial by jury specifically reserved by this court in *Byrd v. Blue Ridge Rural Elec. Corp.,* 356 U. S. 525, 539, footnotes 10, 11.

STATEMENT OF THE CASE.

This is a stark, tragic, heart-rendering accident in which the petitioner, 34 years of age, married, father of three, was totally and irrevocably blinded when a caustic soda known as "Mule Kick" supplied to him in the course of his work as a plumber by his employer exploded and spattered across the room into his eyes. This accident occurred in Lancaster, Pennsylvania where the petitioner resides and is a citizen. The manufacturer of this caustic soda or lye, known in chemistry as sodium hydroxide was the Diamond Alkali Corporation. It sold and delivered this caustic powder to J. A. Sexauer Co., Inc. in large metal drums on which there were labels warning that this product does "spatter". Sexauer then without changing or adding to the product repackaged the same in small cans and sold it through wholesalers and public supply houses throughout the country. Sexauer did no "manufacturing". Sexauer did not make or alter this product in any way. The label Sexauer put on its cans did *not* warn that this product could or would "spatter" and in fact said it would not.

The only place where petitioner, a citizen of Pennsylvania, could get service on both defendants at one and the same time and place was New York. Petitioner was therefore obliged to come to the United States District Court for the Southern District of New York to institute his action, but the action remained basically a Pennsylvania case and all his contacts and all the rights and privileges that accrued to him were governed exclusively by Pennsylvania law. Thus the United States District Court Judge and all courts above were being asked to decide a question of Pennsylvania law. It was therefore the duty of the courts to ascertain Pennsylvania law and to apply it faithfully to this case being tried of necessity in the jurisdiction of the New York Federal Courts. This was not done. The general law was applied.

In trial by jury below, the court directed a verdict in favor of defendant Diamond at the close of plaintiff's evidence (898a). The jury disagreed as to the liability of

defendant Sexauer, and thereafter the trial court entered judgment in favor of both defendants (17a, 18a). The appeal followed. The Court of Appeals affirmed in a two-to-one decision.

The essential facts are these.

On January 25, 1961 plaintiff's employer ordered plaintiff and a fellow-employee, Robert Nixdorf, to the premises at 5 Locust Street in Lancaster, Pennsylvania, to repair a clogged drain in a kitchen sink located in the second floor apartment (207a). Plaintiff and Nixdorf attempted to open the stopped sink by using a rubber plunger. They were unsuccessful (209a-210a).

They then decided to use "Mule Kick". By the admission of defendant Sexauer's own expert, it is a substance which is listed in a basic text entitled, "Handbook of Dangerous Materials" (1918a). As indicated, this was in fact sodium hydroxide. When mixed with water it became a solution of sodium hydroxide.

Defendant Diamond, the manufacturer of this material, shipped it in 400-pound drums[1] on behalf of Sexauer to

1. The drums were labeled:
"WARNING: CONTAINS CAUSTIC SODA. Burns skin and eyes. Avoid contact with body or clothing. Do not take internally. When handling wear goggles or face-shield and avoid all skin contact. *While making solutions, add Caustic Soda slowly to surface to avoid violent spattering.* (Emphasis supplied.) In case of accidental skin contact, flush affected parts with water and wash with vinegar. For eyes, flush freely with water for at least 15 minutes. Obtain medical attention. (700a)." This evidence clearly indicated how dangerous Diamond believed its own product to be. It was evidence of actual notice to Sexauer. It was evidence of Diamond's own appreciation of the danger. But despite the manifest relevance of that evidence as against both defendants, the learned trial judge erroneously excluded that label and its proof from the case and withheld it from the jury (700a). Despite this warning given by Diamond on its own drum label that this product will "violently spatter", Sexauer put on its labels a denial of vital information and said that "Mule Kick" is pure, powerful, safe, and contains no disguised perfumes, no dangerous bubbling adulterants causing injurious spray, explosive gases, harmful fumes." This was a clear assurance that nothing in Mule Kick could cause a violent spattering.

a place in New Jersey where it was packaged in 12-ounce cylindrical cans on each of which at Sexauer's direction there were placed distinctively designed labels entitled "Mule Kick". Diamond's label on its drums makes clear there is no question that this caustic soda when put into solution would "violent[ly] spatter". This established not only that Diamond had actual notice that this product would explode and spray violently but that Sexauer, too, was placed on full clear explicit warning of this characteristic of this caustic soda which Sexauer thereafter had packaged for it and labeled as "Mule Kick". Since the essence of plaintiff's case of Sexauer's liability is directed toward that label's inadequacies, untruths, misstatements and misinformation, the "Mule Kick" label is set forth in its entirety".

"

'MULE KICK'

Trade Mark Registered

Clears Clogged Drains—Peps up lazy drains.
Advertised in The Saturday Evening Post and a household favorite for a generation.
12 oz. net.
No odor—No fumes.
Waste Pipe Cleaner.

DIRECTIONS

To Clear Clogged Drains. 1st. Remove all water possible from drain. 2nd. Never pour cleaner in dry form directly into drain. 3rd. *Dissolve one can in 1 quart boiling water* in 3 gallon iron or enamel pail, Never Aluminum. Use double dose for obstinate stoppages. 4th. Caution: Pour contents of can into pail Slowly, stirring with stick. 5th. Pour solution slowly down drain. 6th. Give 8 hours to work. After solution drains away, flush with plenty of hot water.

IMPORTANT: PREVENT CLOGS, PEP UP SLOW DRAINS—keep clear and sanitary by using one-third can weekly. Keep cover on tight or 'kick' will be lost.

'Mule Kick' is pure, powerful, *safe. Contains* no disguised perfumes, *no* DANGEROUS *'bubbling' adulterants, causing injurious spray, explosive gases,* harmful fumes. 'Mule Kick' will not dissolve broken glass or metal obstructions. It attacks the grease that catches coffee grounds, matches, hair, lint causing stoppages, and releases it. Follow directions closely. 'Mule Kick' will destroy linoleum. (Emphasis ours.)

J. A. SEXAUER MFG. CO. INC.

NEW YORK CITY NIAGARA FALLS, ONT.

Copyrighted 1931, J. A. SEXAUER MFG. CO. INC.

. . . .

FOR HEALTH'S SAKE

Keep all drains clear and sanitary by using one-third can 'Mule Kick' weekly. They are natural breeding places for TYPHOID, influenza and other germs when slow running or clogged. A solution of one-third of a can has many uses about the house: 1st. Use weekly for ice-box, lavatory, sink, toilet, and bathtub drains to prevent clogs. 2nd. To clean and deodorize garbage cans. Swab with rag on stick; let stand half hour, then empty in sewers or cinders. Rinse and dry in sun. 3rd. To clean stove burners, cooking tops, burned cooking utensils (except aluminum) greasecaked tools and machine parts.

To thaw frozen pipes, mix 2 full-can solution as directed and pour into pipe.

KEEP AWAY FROM HANDS, face, clothing, linoleum, aluminium. See antidotes for external and internal caustic burns.

POISON

This Cleaner contains Sodium Hydroxide.

ANTIDOTES—CALL PHYSICIAN

EXTERNAL:

Flood with water, then wash with vinegar.

INTERNAL:

Give vinegar, or juic of lemon, grapefruit, or orange, copiously.
Follow with olive oil.

EYES:

Wash out with 5% boric acid solution.

CONTAINER MADE IN U. S. A." (380a-383a)

Before using the "Mule Kick" plaintiff and Nixdorf asked Mr. and Mrs. Taylor, tenants of the second floor apartment, whether they had put anything into the stopped sink (209a). They told the men they had not (209a). In strict conformity with the instructions on the "Mule Kick" label, plaintiff and Nixdorf removed all the water from the drain (210a). In further conformity with those instructions, they dissolved the contents of a can in boiling water in two batches, mixing and stirring each in a pail until the "Mule Kick" dissolved (213a). The solution was then emptied into the drain and Nixdorf and plaintiff left the premises (213a, 214a). Plaintiff returned the next day to see whether the "Mule Kick" had freed the stoppage (214a, 215a). Upon running some hot water into the sink he found that the stoppage still blocked the free flow of water (215a). Plaintiff then prepared another can of "Mule Kick" in accordance with the directions on the can which stated: "Use double dose for obstinate stoppages." Then he left the premises (215a, 216a).

In the event that the "Mule Kick" was not successful, plaintiff knew that the floor boards would have to be removed to expose the piping, and he realized that such a step required the owner's permission (216a). Plaintiff therefore telephoned his office and requested that such permission be obtained (216a).

Plaintiff returned the next day (216a). The sink was still clogged (218a). It was now apparent that other methods would be required to free the stoppage (218a). The drain pipe from the sink ran down through the flooring of the second floor, through a wall and below the floor of a pantry room on the first floor (218a). Plaintiff removed the floor boards at the juncture of the pantry wall and floor on the first floor (219a). This exposed the place at which the stopped pipe joined another pipe at a 45 degree angle which then ran down to a soil pipe (328a). There was a removable metal plug located on the surface of the angled section of the pipe (219a, 220a).

Plaintiff gingerly loosened the plug and, feeling no pressure behind the plug, removed it completely (220a). At this point in the pipe there was a small seepage but no flow of water (220a). Plaintiff tightened the plug back into the hole (221a). Believing that ice might be forming below the plug, plaintiff briefly applied a Prestolite Heater (a heating device) to the portion of the pipe below the plug (222a). He had no reason to fear applying heat since the label itself called for mixing the solution in *boiling* water. He then attempted to push a flexible metal "snake" from the second floor trap down through the pipe to free the stoppage (222a). This did not loosen the stoppage (222a).

Plaintiff returned to the first floor pantry room and, standing approximately eight feet across the room from the exposed pipe, he tried to determine what to do (223a). There was a sudden, sharp explosion and a large amount of material burst from the pipe at the point where the plug was located, and with a great and violent force it

exploded and spattered over the entire room and caught plaintiff flush in the face and on the body (223a). This spattering material, largely comprised of "Mule Kick", burned plaintiff very severely about his body and particularly his eyes (223a-224a). He immediately doused his eyes with water from a nearby sink, but to no avail (224a). The swift, corrosive action of the lye had eaten into his eyes and eyelids and rendered him totally and permanently blind (497a, 498a).

As we have indicated above, the plaintiff's case against Sexauer is grounded in the legally deficient statements of its "Mule Kick" label, especially since it gave no warning at all that it would or could spatter at all, let alone all the way across the pantry. Indeed its label specifically assured the petitioner that if mixed in solution of boiling water it would not "contain . . . explosive gases and would not cause injurious *spray*". Plaintiff's case against Diamond is that Diamond in checking Sexauer's label "Mule Kick" knew before this accident that Sexauer's label did not warn of spattering and held forth false assurances of safety therefrom and did nothing about it.

Plaintiff submits that each of the following statements of the "Mule Kick" label constitutes a legally inadequate, misleading and false statement which was proven. Each standing alone would raise a prima facie case of negligence against Sexauer. In concert, they underscore the magnitude of the error in granting judgment for the defendant. The same is true as to Diamond, who, despite its awareness of the deficient label of Sexauer, did nothing to protect the unsuspecting public from the hazards it knew the public would and could face in using this product.

What are the defects in the label?

(a) The label describes "Mule Kick" as *safe*. In truth it is extremely dangerous.

(b) The label failed to use the words "Lye" or "Caustic Soda". This absence failed to warn the public that it was that dangerous material.

(c) The label stated that "Mule Kick": "*Contains* no disguised perfumes, no DANGEROUS *'bubbling' adulterants, causing injurious spray, explosive gases,* harmful fumes". In this respect it was misleading, for this product in combination with zinc did cause explosive gases which did explode, and its injurious spatter did blind the plaintiff.

(d) The label ignored the specific warning given by Diamond in its labels on its drums that this product would spatter, explode all over and would burn the eyes. This was a breach of defendant Sexauer's obligation to warn of the hazardous propensities of its product. That breach directly resulted in the accident in suit. Pennsylvania law says so as we shall show *infra.*

(e) These legal defects in the "Mule Kick" label also raise a prima facie case against Diamond because it knew that Sexauer had not printed on its "Mule Kick" label the very warning that Diamond had given Sexauer that this product would violently spatter. Diamond knew that "Mule Kick" was dangerous for the use that Sexauer was selling it. Absent the warning that Diamond had on its own label in respect to "violently spatter", Diamond had no reason to believe that the actual users of Sexauer's product such as petitioner, would know of this unwarned danger of "Mule Kick". Yet it stood silently by and did nothing to compel Sexauer to take any measures of any kind to inform purchasers such as petitioner of those terrible dangers, after it knew that Sexauer was not giving the actual users adequate warning about the explosiveness and spattering in solution of this soda.

To understand just how legally defective the "Mule Kick" label was, it is necessary to understand the properties and use of the material. Sodium hydroxide (the chemical term for cleaners of this type) is a chemical which eats away stoppages (908a, 909a). This is generally a gradual process depending upon the nature of the stoppage and/or the pipes in which the stoppage occurs. Some manufacturers of drain pipe chemical cleaners intentionally add

adulterants such as aluminum or zinc to their cleaners (906a). These adulterants are deliberately packaged in the cleaner to cause the production of propulsive gases in clogged pipes (1011a). This is very hazardous since the presence of gas maximizes the danger of explosion or spraying of the corrosive cleaning matter, or both (728a).

The "Mule Kick" label was deliberately designed to create the impression that Sexauer's product was safe. It said so. It also said it contained no "DANGEROUS bubbling adulterants, causing injurious sprays, explosive gases, harmful fumes". It was not safe, for in the kind of chemical combinations which both Sexauer and Diamond expected would occur, "Mule Kick" would cause explosions and spatters.

It is axiomatic that sellers such as Sexauer and manufacturers such as Diamond contemplated that in its ordinary use this type of product would be placed into galvanized pipes which are partly made of zinc and contain various foreign substances including metallic materials. It is equally apparent that they would expect, indeed intend, that the solution which ultimately blinded plaintiff would be placed into metal pipes.

Plaintiff's proof showed that a section of the metallic surfaces of the pipes in question was galvanized, and a galvanized surface will react chemically with sodium hydroxide to create explosive gases. This is so because galvanized pipe contains zinc which in contact with sodium hydroxide will produce hydrogen, a notoriously volatile and explosive gas (728a). As a matter of fact, zinc is one of those adulterants which some manufacturers deliberately add to their sodium hydroxide drain cleaners to give them the propulsive effect of a gas explosion once they are dissolved in water. Presumably the manufacturers of those products give clear and distinct warning of that violent explosive spattering characteristic. Here the label stated that no adulterants were put in and a user could presume that "Mule Kick" would and could not spatter at least not that

violently. That effect is precisely what happened in this case and yet plaintiff not only got no warning of this but in effect the "Mule Kick" label assured him that it would not happen.

Plaintiff's proof showed that on this occasion the destructive "Mule Kick" solution chemically reacted with the metal of the pipes into which it was placed to produce an explosive gas (727a-729a). The gas in turn exploded, suddenly drove the stoppage down the pipe, forced the plug from its seat and sprayed the corrosive "Mule Kick" into plaintiff's eyes (730a, 731a).

The fact is that the "explosive gases" which the "Mule Kick" label said would not be created were indeed created.

Plaintiff's expert, Dr. Willard, Professor of Chemistry at Pennsylvania State University testified as to the cause of the accident and the cause of the explosive blow-out of the plug and the spraying out of the material from the pipes all the way across the pantry into the petitioner's eyes, some ten feet away and six feet up into the air. Because of the importance of the testimony, we quote it:

> "In my opinion the metallic fragments, which were in the pipe, the zinc coming from the elbow, the iron, the aluminum fragments reacted chemically with the sodium hydroxide to liberate the hydrogen" (727a).

and again:

> "I believe two things caused the plug to blow out and cause this material to blow out. One was the production of hydrogen here, one was the heated solution of lye or sodium hydroxide or Mule Kick here." (730a).

Both defendants knew this could occur. Both defendants knew that the "Mule Kick" was not safe as it was represented to be. Both knew or should have known that it could cause an explosive spattering of the solution. Both defendants knew that once that explosion occurred extremely corrosive lye solution could be blown into the face and eyes of unsuspecting users such as the plaintiff.

The trial judge did not apply Pennsylvania law. His decision on the established facts in the record was completely at odds with Pennsylvania law and ignored the clear impact, instruction and teaching of the landmark case of *Maize v. The Atlantic Refining Co.*, 352 Pa. 51, 41 A. 2d 850 (1945) which controls this case directly. Under the decisional law of this court petitioner was entitled to Penna. law. Instead he applied as did the Court of Appeals majority, the *general* law on the subject quoting cases from other jurisdictions. But Pennsylvania law is different. It is a giants' step ahead of other jurisdictions cited and quoted in advancing and protecting the public interest and safety in such cases as this. It imposes liability for false or inadequate or illegible labels that fail clearly to warn of the inherent dangers of dangerous products sold for use by the public. It imposes a duty on the manufacturer and distributor to know the chemical and reactive properties of its product. *Pope v. Reading Co.*, 304 Pa. 326, 156 Atl. 106 (1931). As a result the judge in confusion and miscomprehension of the proper law to apply under the urging of counsel for respondent directed a verdict for respondent as to Diamond at the conclusion of the evidence thus denying petitioner a right to trial by jury as to Diamond and after a hung jury as to Sexauer he granted judgment on the record against the plaintiff.

Under the circumstances above, petitioner contends that the trial judge originally erroneously ruled that the petitioner did not prove a prima facie case against both of the respondents and that the Court of Appeals was in error in ruling two-to-one that the petitioner had not proved a prima facie case against both respondents. This action by the lower court affirmed by the Court of Appeals in its opinion two-to-one as to Sexauer deprived the plaintiff of his right to trial by jury as guaranteed by the 7th Amendment. *All of which was brought on by the trial judge's failure to apply Pennsylvania law as required to this purely Pennsylvania accident under the law enunciated in Erie R. R. v. Tompkins*, 304 U. S. 64 (1938).

REASONS URGED FOR GRANTING THE WRIT.

1. Even though the record contained explicit testimony that the cause of the accident was that defendant's dangerous product produced hydrogen which exploded—a danger which defendant never warned against and explicitly stated could not happen, the district court and the Court of Appeals in a two-to-one opinion sustained a directed verdict for the defendant because "the cause of the accident was completely unknown". By so doing these courts have deprived the appellant of his right to a trial by jury as guaranteed by the Seventh Amendment of the Constitution of the United States.

2. The majority's mistreatment of *Maize v. The Atlantic Refining Company*, 352 Pa. 51, 41 A. 2d 850 (1945) and *Pope v. Reading*, 304 Pa. 326, 15 A. 106 (1931) is a direct violation of the law as stated by this Court in *Erie R. R. Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817 (1938).

3. The majority of the Court of Appeals below failed to apply Pennsylvania law as stated in *Maize v. The Atlantic Refining Company, supra* and *Pope v. Reading Co.*, 304 Pa. 326, 156 Atl. 106 (1931) and *Antonelli v. Tumolo*, 390 Pa. 68, 73, 132 A. 2d 285 (1957) and this is a direct violation of the law as stated by this court in *Erie R. R. Co. v. Tompkins, supra.*

4. This Court's views as to Reasons 2 and 3 remain open for decision because this Court in *Byrd v. Blue Ridge R. E. Corp.*, 356 U. S. 525, 539, 78 S. Ct. 893, 901 expressly left open for decision later the constitutional question whether the federally protected right to trial by jury embraces the issues of causation and burden of proof. See n. 10, 11 at Page 539 in *Byrd v. Blue Ridge, supra,* opinion. Now this judge-jury issue arises head-on in this case.

Introduction.

We recognize at the outset that this court is deluged with business and with momentous problems both in civil rights involving alleged criminals and the violation of the civil rights of racial groups so that it cannot attempt to review all of the decisions by the various Courts of Appeals with respect to whether or not a jury trial has been denied the plaintiff under the Seventh Amendment. However where there is not merely a question involving the deprivation of the right to trial by jury under the Seventh Amendment, but also whether a litigant has been deprived of the rights that would have accrued to him had the law of the correct jurisdiction whose decisional law does control been applied as it is required to be under *Erie Railroad Co. v. Tompkins, supra,* doctrine, then we respectfully submit that denying the right to trial by jury in such a case under those circumstances is a two-fold reason for the intervention by this court in protection of that very important right. And we shrink from the thought that this court might deny certiorari where the petitioner has been deprived of a right to trial by jury which would result in his not being afforded fair compensation for the awesome injuries he has suffered—total, complete, irrevocable blindness in both eyes at so young an age when his responsibilities as a husband and father are so great, where there is at the least a pure conflict of evidence which makes out a prima facie cause of action. But we are confident that this court will again here as it has so conscientiously done in the past, keep close scrutiny over the lower courts to assure that the right to trial by jury will not become meaningless. For this is what unfortunately happens when trial judges' allow themselves to become influenced by their own view of where the weight of the conflicting evidence lies to the point that they sometimes enter a directed verdict, sometimes try to charge a plaintiff out of court or enter judgment n. o. v. if the plaintiff up to that point has prevailed despite such judicial enterprise.

We also recognize that there are some instances in which a jury should not be allowed to pass upon the decision and that there should be directed verdicts for defendants in particular cases bare of all supportive proof of the plaintiff's theory. But that is not this case.

This case we reiterate is an outstandingly strong case of liability under Pennsylvania law, against both respondents [2] where the petitioner who has been totally and permanently blinded in both eyes at the age of 34 has been deprived at this juncture of his right to a trial by jury by the district court and by a two-to-one decision in the Court of Appeals caused by a multiplicity of judicial errors.

I. Petitioner Has Been Deprived of His Right to Trial by Jury as Guaranteed by the Seventh Amendment by the Actions of the Courts Below.

At the outset, we submit Judge Friendly's opinion as a dissent points out precisely what the majority has ignored, namely, the evidence as to the cause of the accident as pointed out by Dr. Willard. Judge Friendly points out in the beginning of his opinion "I believe the majority's affirmance of the dismissal of the complaint with respect to

2. Diamond as the manufacturer and supplier for use of dangerous chattels for use by third person falls squarely within Restatement of Torts, § 388. This section reads "Chattel Known to be Dangerous for Intended Use—One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the suppliers should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous." See also note to 388 on p. 307. The record contains clear proof that Diamond knew that Sexauer had deleted vital warnings from the label. Mr. Sexauer (679-680a) said that Sexauer's label had been checked and approved by Diamond Alkali.

the defendant Sexauer, unwarrantably deprives the plaintiff of his right to a jury trial" (1868).

The crux of the error, in the majority opinion, is succinctly stated by Judge Friendly in his dissent when he says, "the majority opinion, as I understand it, rests on the basis that he [the plaintiff] did not present sufficient evidence to show what the cause of the accident was and it would, therefore, have been impossible for Sexauer to have prepared a warning that it would have prevented the catastrophe" (1868). As proof that this is the crux of the majority opinion, we quote from it:

> ". . . what should have been put on the label which might have prevented this accident? No answer can be given to this question because the cause of the accident is completely unknown" (1860).

Thus, if it can be demonstrated that that conclusion is wrong, the decision is wrong and plaintiff has been deprived of his right to a trial by jury under the Seventh Amendment.

The majority opinion shows how flatly wrong it is for the majority itself has accurately recognized that Dr. Willard:

> ". . . concluded that there were two causes of the accident, (1) the production of hydrogen, and (2) the heated solution of lye" (1859).

The majority did not, nor could it have held, that Dr. Willard's testimony was legally insufficient to prove the cause of the accident. As a matter of law, it, therefore, presented a prima facie case of causation and this blind man has been deprived of his right to a trial by jury by the decisions of the two lower courts.

Judge Friendly after concluding that plaintiff's proof might be enough even without the expert, then said at p. 1869:

> "However, the proof went considerably beyond this. Dr. Mary Willard, Professor Emeritus of Chem-

istry at Pennsylvania State University, *testified that in her opinion the accident was caused by the production of hydrogen from the combination of zinc with the heated solution of sodium hydroxide.* She thought that the production of hydrogen above the stoppage forced the stoppage down through the pipe past the clean-out hole and that this pressure expelled the plug and the caustic solution through the hole. Another theory, consistent with a statement by Stief in applying for workmen's compensation benefits although in conflict with his trial testimony, is that there were two stoppages, one of ice above the plug and another of grease and debris below; that the melting of the ice by the torch caused some of the Mule Kick solution to fall through the pipe past the clean-out hole where it was stopped by the second blockage; and that the reaction of the Mule Kick with zinc in the pipe at the high temperature created by the torch produced hydrogen, which expelled the plug and caused the mixture to spurt through the hole."

He then stated (p. 1870):

> "If twelve practical people can be persuaded that Stief's theory of the accident was more plausible than Sexauer's, I fail to understand how a judge could say they had gone beyond the bounds of reason."

And then concluded (p. 1872):

> "Depriving Stief of jury determination of the common sense questions on which his case against Sexauer depends runs wholly counter to the trend of Supreme Court decisions over the past decades."

There can be no doubt that this is a fact.

This is the first case presenting to this court the question of whether this procedural adjectival law [evidence] point as stated by *Lavender v. Kurn, supra* applies with equal force in ordinary diversity tort matters as well when tried in the several district courts since *Byrd v. Blue Ridge*

Rural Elec. Cooperative, 356 U. S. 525, 538, 539, 78 S. Ct. 893, 901, 2 L. Ed. 2d 953, where this issue was specifically reserved and not then decided.[3] Judge Friendly adopted the modern rule that gives the widest possible scope to the jury function and its verdict. The majority applied the restrictive rule that calls for the elimination of every other possibility by the plaintiff before he can prevail even though there be a clear conflict of opinion as to causation, depending on which facts or inferences are accepted. We respectfully submit this court approved the approach followed by Judge Friendly here when it wrote *Lavender v. Kurn, supra* and in which this court held at p. 653:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

Is not the rule of *Lavender v. Kurn,* 327 U. S. 645 (1946), an FELA case as adopted by Pennsylvania in *Antonelli v. Tumolo,* 390 Pa. 68, 73, 132 A. 2d 285 (1957) as its basic

3. "Our conclusion makes unnecessary the consideration of—and we intimate no view upon—the constitutional question whether the right of jury trial protected in federal courts by the Seventh Amendment embraces the factual issue of statutory immunity when asserted, as here, as an affirmative defense in a common-law negligence action. Footnote 10, p. 539."

test of submissibility as to causation binding on all Federal Courts or at least in diversity actions controlled by Pennsylvania law because the accident and all contacts occurred and exist there, or must a plaintiff eliminate every other possibility that arises from the evidence except those supporting him?

The question remains open as to whether the rule of *Lavender v. Kurn, supra,* as adopted in *Antonelli v. Tumolo, supra,* relating to causation is binding on all federal courts or at least in diversity actions controlled by Pennsylvania law because the accident and all contacts existed there. There remains open therefore the question of whether the plaintiff must eliminate every other possibility that arises from the evidence as to causation excepting those supporting him or whether it suffices that there be some evidence supporting him that per se requires the case to be submitted to the jury on the issue of causation.

It is true that *Lavender v. Kurn* was an FELA case, but we do not think that rule of law was adopted by this court solely for Federal Employer's Liability Act cases or Jones Act cases. We think it must be applied in all actions including ordinary diversity tort cases. Common justice would seem that what is a fair rule of law in those cases must be held to be equally fair for other actions not involving work sustained injuries. Indeed this court did grant certiorari and reversed without an opinion the holding below of *Swafford v. The Atlantic Coastline Railroad Company,* 350 U. S. 807, 76 S. Ct. 80 (1955) which was not FELA, but a grade crossing case where plaintiff was put out of court as a matter of law. Apparently the failure to write an opinion has caused the impress of that decision to lose its impact on some judicial minds in the lower courts and an opinion on the subject therefore is of vital importance since so much litigation in the several federal courts of the United States are ordinary diversity actions and this question must arise over and over again as a matter of daily rote.

The court has repeatedly ruled that a case such as this must be decided by a jury. In *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines,* 369 U. S. 355, 82 S. Ct. 780 (1962), a diversity case, it held at 369 U. S. 360, 82 S. Ct. 784:

> "As we recently stated in another diversity case, it is the Seventh Amendment that fashions the federal policy favoring jury decisions of disputed fact questions. *Byrd v. Blue Ridge Rural Elec. Cooperative,* 356 U. S. 525, 538, 539, 78 S. Ct. 893, 901, 2 L. Ed. 2d 953. And see *Herron v. Southern Pac. Co.,* 283 U. S. 91, 94-95, 51 S. Ct. 383, 384, 75 L. Ed. 857."

Byrd v. Blue Ridge Rural Elec. Cooperative, supra, has become a leading and outstanding case in this country since its decision several years ago. That case involved a simple question of fact in a diversity matter. No federal issues were involved. Purely local law was involved—the law of South Carolina. There was not even that extra twist that exists in the instant case where the judge of one district was interpreting and applying the law of another state to the case before him which he is compelled to apply as that state would apply it were it tried in that court. Nonetheless because the Seventh Amendment can bear no intrusion upon it if it is to survive and be meaningful and effective, this court wrote the opinion in that case and followed it with *Atlantic and Gulf Stevedores v. Ellerman Lines, supra,* as well as having done the same in *Herron v. Southern Pac. Co., supra,* so many years ago.

There is only one other conceivable reading of the basis for the majority decision. It is found in the following quotation:

> "If there had been any testimony from which it could be inferred that it was reasonably foreseeable that contact of Mule Kick with zinc found in galvanized pipe would cause formation of explosive gases, plaintiff would be on firmer ground. But plaintiff was un-

> able to produce any evidence that would indicate that such a phenomenon as here occurred had ever happened during the generation Mule Kick had been on the market (some 3,800,000 cans sold) despite the fact that galvanized pipe is "probably the most common of all types of pipe" (Pl. Reply Br., p. 2)." (1860)

Having thus raised the issue of foreseeability, rather than reviewing the evidence and the law, the opinion confesses that its conclusion that the accident was not foreseeable is based upon the failure of plaintiff to produce proof that similar accidents had happened before. To reach this conclusion, we respectfully submit that the majority must have ignored the law and the facts.

With respect to the law, as Judge Friendly points out in his dissent, this Court ignored its own New York case of *Butler v. L. Sonneborn Sons, Inc.*, 296 F. 2d 623, 626 (C. A. 2, 1961) where it said:

> "But, especially when injury is likely to be serious if trouble occurs, even slight foreseeability may warrant, and a long history of good fortune will not necessarily exclude, a conclusion by the trier of the facts that prudence requires the manufacturer to take on so small an added burden."

Indeed to sustain its holding the majority below had to ignore and/or overrule *sub silentio* a case cited in our brief below, *Pease v. Sinclair Refining Co.*, 104 F. 2d 183 (C. A. 2, 1939) when Judge Clark speaking for the Court said at 185:

> "This, therefore, is one of those cases where not unusual human conduct produces results so unexpected and tragic as to startle and amaze. Yet legal precedents and human experience combine to show that *bizarre accidents are far from unlikely, and recovery cannot be denied because of the uniqueness of the happenings.* Usually judicial rationalization is couched largely in terms of 'foreseeability', but it is obvious

> that, if it is the exact accident which must be foreseen, then recovery must regularly be denied (as it is not). Perhaps in this class of cases, it is easier to reach decision than to explain it, for explanations tend towards abstract generalities, under which are lumped all sorts of accidents, from railroad and automobile collisions to chemical explosions. *At any rate, given some culpability on the part of a defendant,* i.e. some conduct involving a departure from the natural, and hence the reasonable, then *the courts look more for the possibility of hazard of some form to some person than for an expectation of the particular chance that happened.*" (Emphasis supplied.)

That the law of Pennsylvania is not as stated by the majority below is very evident from *Carpini v. Pittsburgh and Weirton Bus Company,* 216 F. 2d 404, 407 (C. A. 3, 1954), a case strikingly analogous on its facts. There: "General Motors [the defendant bus manufacturer] cited the experience over the years with this type of design, tending to show that despite the millions of miles vehicles of this sort have traveled on highways no bus accident of the type here involved has been reported."

The unanimous Court of Appeals for the Third Circuit held, per Goodrich, J., that the weight of such evidence

> ". . . was for the trier of the fact. But, of course, it was not conclusive . . ." (at 407)

Such evidence should not be conclusive here either. The majority is not only in conflict with the clear law in this and other Circuits, but it is substantively inconsistent within its own opinion, for at the outset it held that ". . . the fact that the accident was 'most unusual' is not to be considered in deciding whether the directed verdict was justified" (p. 1852). Now, we respectfully submit, it has done exactly that.

The Court of Appeals for the Second Circuit is not free to ignore or rewrite law on this point of foreseeability

dependent upon proof of similar accidents that occurred before, other than in cases that arise out of a state which adopts that principle of law as its basic law. And as we have pointed out in *Carpini v. Pittsburgh and Weirton Bus Company, supra,* the law of Pennsylvania is opposed to the view expressed by the majority and adopts explicitly the view noted by Judge Friendly in his dissent in this case which followed *Butler v. L. Sonneborn Sons, Inc.,* 296 F. 2d 623, 626 (1961). So that that red herring proposition of foreseeability set up as an obstacle to recovery in this case cannot legally affect this petitioner who comes from Pennsylvania supported by the law of Pennsylvania as set forth in *Maize* and *Pope, supra,* for trial in the Second Circuit.

With respect to the facts, the majority below completely ignores the statement from the defendant's own mouth—Mr. Springhorn, formerly sales manager and at the time of trial the assistant to the President of J. A. Sexauer Manufacturing Co., Inc. He admitted that "Mule Kick" in combination with zinc produced hydrogen—a highly explosive gas. *He actually thought this warning was on the can. In fact there was no such warning. His mistaken belief that it was on the can was certainly evidence from which the jury could find that he knew that users of "Mule Kick" should have been warned by the label that hydrogen would have been produced.* It is most unfortunate that the majority failed to appreciate the crucial legal significance of this evidence. In truth, it was a crushing, devastating admission. It proved that defendant itself recognized the very exact awful danger that blinded this petitioner.

But what is also important on this issue is what the majority has done here. Plaintiff produced no proof that an accident such as this had occurred before (it is a simple fact of life that proof of prior accidents would have been within the control of the defendant). However, defendant also produced no proof that they did not have reports of

previous accidents such as this. The majority has used this lack of proof to deprive the plaintiff of a jury trial as guaranteed by the Seventh Amendment, even though the plaintiff proved that a real and dangerous hazard existed from the use of their material. As Judge Friendly so accurately said:

> "The majority argues against this that there is no evidence of previous experience of Mule Kick having generated sufficient hydrogen gas through contact with galvanized pipes to cause an explosion. *Of course the absence of any evidence to this effect does not mean that no such incident had ever occurred.* In any event the jury could find that since the hazard was known, Sexauer was under a duty to warn against it and certainly under a duty not to say things that would invite it." (1871)

In recapitulation, the point is that Pennsylvania law commands the submission of the issue of negligence and causation and its corollary questions to the jury. A Pennsylvania court would have submitted it to the jury. *Pope v. Reading, supra; Maize v. Atlantic Refining Co., supra,* and *Antonelli v. Tumolo, supra* all say so. It is a Pennsylvania case that states what is Pennsylvania law. But Federal Courts in New York did not follow Pennsylvania law in any respect. It barely noted *Maize, supra.* Thus this Court's protection of this vital right is beseeched. The built-in novel questions of law found in the case, being national in scope of importance need determination, analysis and in part restating in this setting. This Court some years ago reserved for decision in the future. That day is now.

At the outset, we indicated that this Court can only protect a plaintiff's right to trial by jury by granting certiorari in specific cases where plaintiff has obviously been deprived of his right to trial by jury. We also recognize that this court would face an exceedingly burdensome, if not impossible, task if it had to read the entire record in every case to determine whether or not plaintiff has been

deprived of his right to a trial by jury. However, we respectfully submit that in this instance such reading is not necessary. We have attempted to pinpoint the issue. The majority opinion hinges upon the fact that the plaintiff did not prove the cause of the accident. Suffice it to say, that page 727 of the record, Dr. Willard said:

> "In my opinion the metallic fragments, which were in the pipe, the zinc coming from the elbow, the iron, the aluminum fragments reacted chemically with the sodium hydroxide to liberate the hydrogen."

She also said at 730:

> "I believe two things caused the plug to blow out and caused this material to blow out. One was the production of hydrogen here, one was the heated solution of lye or sodium hydroxide or Mule Kick here."

Judge Friendly forceably pointed out this testimony and he concluded that this blinded petitioner was deprived of his right to trial by jury. We submit that he is correct and that this Court in the interest of preserving that right of a jury trial governed by the use of the correct principles of law which is, after all, the foundation of our system of justice should grant certiorari and reverse in this shocking case.

II. The Court of Appeals for the Second Circuit, in Deciding This Case, Has Ignored the Command of Erie Railroad Company v. Tompkins, 304 U. S. 64, 58 S. Ct. 817 (1938).

In *Erie Railroad Company v. Tompkins, supra,* the plaintiff was injured in Pennsylvania by a passing freight train while walking along the defendant's right-of-way. The plaintiff brought suit in the Federal Court for the Southern District of New York. The defendant, after a jury verdict for the plaintiff, argued that the only duty owed to the plaintiff was that owed to a trespasser, since

that was the Pennsylvania law. The plaintiff argued, however, that since there was no statute of the state on the subject, the railroad's duty and liability were to be determined in the Federal Courts as a matter of "general law". The Court stated the reason why it granted certiorari in these words:

> "Because of the importance of the question whether the federal court was free to disregard the alleged rule of the Pennsylvania common law, we granted certiorari." 302 U. S. 671, 58 S. Ct. 50, 82 L. Ed.

The lower courts held that under the doctrine of *Swift v. Tyson,* 16 Pet. 1, 18, 10 L. Ed. 865, they would apply "general law" and thus allowed a recovery. The Court then held:

> ". . . Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."

This is the crux of this case. The federal district court in New York did not concern itself with this decision. On the other hand, it ignored this mandate. It refused to recognize the forward looking law of Pennsylvania. As an outstanding example—in the sense of avoiding Pennsylvania law, the lower court never mentioned, discussed, explained away or distinguished the *Maize* case which so plainly renders the granting of the motion naked legal error. And we respectfully submit here that the majority in the Court of Appeals has ignored this proposition for it has only discussed tangentially the law of the State of Pennsylvania and in that respect, has misconstrued the leading case of *Maize v. The Atlantic Refining Company,* 352 Pa. 51 (1945) and ignored the principle in *Pope v. The Reading Company,* 304 Pa. 326 (1931).

We are the first to admit that Pennsylvania has gone as far in imposing liability in this phase of tort law as any jurisdiction in the United States. Indeed it has been in the avant-garde. As early as 1952, it pronounced this doctrine in *Maize v. Atlantic Refining Company,* 352 Pa. 51, 41 A. 2d 850 (1945) and has abided by that decision ever since. This case stands for the proposition that the manufacturer and distributor of a product will be held to strict accountability for its product and must give clear definite specific warning of all of its characteristics and properties, particularly in the field of human consumption or where human contact might be made with the product to the detriment of the human body. In addition, Pennsylvania has likewise taken the lead and has pronounced the doctrine of *Pope v. Reading,* 304 Pa. 326, 333, where it adopted the ancient doctrine that "every man must have some knowledge of the quality of his beast", 1 Hale P. C. 430, and use appropriate means to keep that beast from harming people. These doctrines were interpolated into the tort decisions with respect to buildings and into products liability cases.

In *Rockwell v. Stone,* 404 Pa. 561, 173 Atl. 2nd 48 (1961), a case where plaintiff was negligently injected with sodium pentothal, the jury was instructed, which instruction was affirmed, as follows:

> "The law of Pennsylvania is that anyone dealing with and dispensing dangerous substances to another is under *the duty of a high degree of care* and must use every scientific method at the disposal of such person or persons to insure that no harm will result from the use or dispensing of that dangerous agency to another." (Emphasis supplied.) (Pages 571-572 of the Opinion)

It may well be that in other jurisdictions such as New York the law has not advanced as far nor has the responsibility attached as vigorously and rigorously as it has in Pennsylvania. It may well be also that this led the Court below into ignoring the mandate of *Erie v. Tompkins, supra.* But we are trying a case that occurred in Pennsyl-

vania to which Pennsylvania law attaches itself, and whether the case be tried in Pennsylvania or tried in New York state court or tried in the Federal Court in New York, Pennsylvania law, as the Pennsylvania courts would interpret it, must be applied in that court. This was not done here. This is a direct violation of the principle of *Erie v. Tompkins, supra.*

As has been stated, Pennsylvania has taken the lead in holding a manufacturer or distributor responsible for mislabeling or inadequateily labeling a product which is dangerous. It did so in *Maize* and this case is ruled by it.

In that case plaintiff's decedent died when she inhaled fumes from a cleaning fluid which she used in a closed room. In an opinion which leaves no doubt as to the state of Pennsylvania's law, the Supreme Court of Pennsylvania imposed liability because of the inadequacy of the warning on the can even though the can did state in small letters that the fluid should be used only in well ventilated places. The can also had displayed on it the words "Safety-Kleen". On these facts the Supreme Court of Pennsylvania held that the case had to be submitted to the jury.

> "In the instant case it is clear that the court below could not declare as a matter of law that the defendant in displaying as it did the 'cautionary' admonition on its can of Safety-Kleen discharged its full duty under the circumstances and was not guilty of negligence. It is equally clear that the court could not declare as a matter of law that Mrs. Maize's failure to heed the cautionary admonition displayed on the can, as above described, amounted to contributory negligence. *The case was for the jury.*" (Emphasis supplied.) (at 352 Pa. 57, 41 A. 2d 853)

What was clear in *Maize* is equally clear here. Constitutionally this controversy must be resolved by a jury.

In *Maize, supra,* the Court said (352 Pa. 55, 41 A. 2d 852):

> "That the fluid the defendant manufactured and sold for general use in cleaning fabrics is highly dangerous is proven by the tragic result in this case."

By that test this product was highly dangerous. The duty of the defendant is clear.

> "Vigilance must always be commensurate with danger. A high degree of danger always calls for a high degree of care. The care to be exercised in a particular case must always be proportionate to the seriousness of the consequences which are reasonably to be anticipated as a result of the conduct in question." *MacDougall. v. Penna. Power and Light Co.,* 311 Pa. 387, 396, 166 A. 589, 592 (1933).

In addition the Court ignores the law of Pennsylvania, as found in *Pope v. Reading Company,* 304 Pa. 326 at 333, 156 Atl. 106, 107 (1931), where the Court said:

> ". . . At common law it was held that every man must have some knowledge 'of the quality of his beast' 1 Hale P. C. 430) and use appropriate means to keep that beast from harming people. Public welfare requires that this same salutary rule apply to the inanimate objects in a man's possession and subject to his intelligent control."

There is not a shred of doubt that Sexauer knew that zinc, as well as aluminum, was a completely expectable material which "Mule Kick" might contact. The Assistant to its President, Springhorn, flatly testified that the label stated that when "Mule Kick" contacted zinc, it produced hydrogen (636(a)-637(a)). When shown the can, he recanted, "I thought it was on the can, but apparently it isn't" (637(a)). One could not prove Sexauer's knowledge of the hazard of the material, or it's foreseeable consequences with more potent documentation.

The entire point, which respondent never faces, is that an explicit warning was imperative and defendant never gave one by telling the user that under reasonably expect-

able conditions, the product would cause an "injurious spray" and highly dangerous "gases". Indeed, it mislead the users by stating that it would not "bubble or spray". And Diamond knowing all this did nothing about its "beast" to protect the unwary public.

CONCLUSION.

1. Petitioner, a young blind man, has been deprived of his right to trial by jury.

2. This court is burdened by broad questions of policy and perhaps may not want to consider what is the only equitable solution.

3. Justice cries out for a grant and reversal in this case.

4. Logic compels the grant.

5. The basic organic law as it interplays between the federal and state systems is deeply involved here and needs clarification.

6. An individual life and the life of his family is involved.

7. This court exists for individuals and principles.

8. If certiorari is not granted an injustice and a grave wound on our jury system will be accomplished.

Certiorari should be granted—the affirmance reversed and a new trial granted.

Respectfully submitted,

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